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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1437

CALLMAN GOTTESMAN and PAUL J. PEYSER,

Petitioners,

v.

GENERAL MOTORS CORPORATION and E.I. DU PONT DE NEMOURS & COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 23, 1979

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Respondent General Motors' brief in opposition seeks to avoid the issue of express *judicial* preemption of State corporation law by attempting to bog this Court down in hypotheses as to that very State law which the courts below refused to apply. Respondent du Pont's brief in opposition is beside the point.

Promptly after this Court's emphatic reaffirmation of state law governance of derivative actions and internal affairs of corporations except where *Congress* "expressly" provides to the contrary (*Santa Fe Industries, Inc.* v.

Greene, 430 U.S. 462, 479 (1977)), the district court held (A-18): "The decision in *Alyeska** completely forecloses any recovery here". The Court of Appeals explicitly affirmed on that basis, holding (A-10): "the applicable rule . . . is . . . *Alyeska* v. *Wilderness Society*". Therefore, both courts below explicitly disregarded the "dual nature" of derivative actions. *Ross* v. *Bernard,* 396 U.S. 531, 534 (1970)—Pet., page 12.

I.

"Meritorious Action" Under Delaware Law

This serious impairment of the federal system is not cured by General Motors' fanciful conjectures (Br. p. 3-5) as to what the lower courts *might* have held that Delaware, in turn, *might* have held, when in fact Delaware has passed quite specifically on the meaning of "meritorious action". We add to the quotation of the Chancellor (Pet. p. 5-6) from *Lewis* v. *Scotten Dillon Co., et al.,* 306 A.2d 755 (Del. Ch. 1973)

> "In short, plaintiff has demonstrated a *triable* issue on fraud under §152." (at 758, emphasis added)

As our petition points out (pp. 8-9), respondents' reliance upon not "clearly erroneous" in two appeals on the merits necessarily admits a "meritorious action" under Delaware law, having "triable issues".

Earlier (as quoted Pet., p. 5) the Chancellor had held (at 756):

> "In other words, I am unable to find as a fact that the cancellation was induced by the litigation."

* *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240 (1975).

The Delaware Supreme Court in affirming an award of counsel fees because of the " 'reasonable hope' of success" particularly noted its justification "even if the cancellation was not induced by the present litigation", and the "triable issue" of fact (*sub nom. Iroquois Industries, Inc.* v. *Lewis,* 318 A.2d 134 (Del., 1974).

The Court of Appeals reference (A 10) to this "epic case", finding in the same paragraph that it "required . . . expert professional services" and "involved complex facts and difficult questions of law" are sufficient on their face to show that the courts below preempted state law in derogation of the federal system in failing to enforce Delaware's remedy of counsel fees where there are "triable issues" of fact in "meritorious actions".

II.

"Benefit to the Corporation" Under Delaware Law

General Motors (br. p. 5) concedes that Delaware finds "benefit" to the corporation in "disclosure of matters which had been wrongfully concealed".

But Chancellor Seitz had held even more:

> "I find it *unnecessary* to decide whether in fact there was doubt about this ownership". (emphasis added)

It was "remov[al] from the area of *possible* substantial doubt" which was "a benefit to the corporation". *Saks* v. *Gamble,* 38 Del. Ch. 504, 154 A.2d 767, 770 (1958)—Petition, page 7. (emphasis added)

Even before the divestiture decree* in 1961, the district court in Chicago had appointed special counsel to advise

* *United States* v. *E.I. du Pont de Nemours & Co., Inc., et al.,* 366 U.S. 316 (1971).

as to the separate interest of General Motors' shareholders.* Divestiture was completed in 1966.

As to another Delaware corporation (see *Burks* v. *Lasker*, No. 77-1724, argued January 17, 1979) an independent quorum was advised by independent counsel.

Here, where in the first appeal (268 F.2d 194, 197-198, decided June 18, 1959) the issue was who "*ought* most properly to press [the case] forward" (emphasis added), petitioners ". . . *did* succeed in obtaining an accounting from du Pont . . ." (A-11), despite General Motors' interpositioning through staff counsel of every conceivable opposition and known defense including even statute of limitations against its own interests.

General Motors' own discussion of Delaware law demonstrates, and in effect concedes, that both courts below erred in failing even to apply it.

For petitioners to "succeed" in the remedy of an "accounting" in a derivative "meritorious action" means that it is of importance to the remedies of fifty states that the writ should be granted.

* *United States* v. *E.I. du Pont de Nemours & Co., Inc., et al.*, 171 F.Supp. 1-8 (1959).

CONCLUSION

A writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

April 23, 1979

Respectfully submitted,

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